

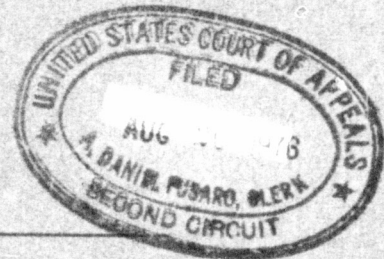
***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75 - 7682

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



ROBERT CALHOUN, JR.,

Plaintiff-Appellant,

-against-

H. SPENCER KUPPERMAN, ESQ., CRAVATH, SWAINE
& MOORE, its agents and others, THACHER, PROFFITT,
PRIZER, CRAWLEY & WOOD, its agents and others,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, its agents,
MICHAEL H. DIAMOND, HENRY P. BAER, J. PHILLIP
ADAMS, PEGGY L. KERR, and others, FREEMAN, MEADE,
WASSERMAN & SHARFMAN, its agents and others.

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE
CRAVATH, SWAINE & MOORE

CRAVATH, SWAINE & MOORE,
Defendant-Appellee Pro Se,
One Chase Manhattan Plaza,
New York, N. Y. 10005

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In the
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FOR THE SECOND CIRCUIT

Docket No. 75-7682

ROBERT CALHOUN, JR.,

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-against-

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its agents and others, THACHER, PROFFITT, PRIZER,
CRAWLEY & WOOD, its agents and others, SKADDEN, ARPS,
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HENRY P. BAER, J. PHILLIP ADAMS, PEGGY L. KERR, and
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Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE
CRAVATH, SWAINE & MOORE

PRELIMINARY STATEMENT

Plaintiff appeals from the order of the District Court
(Hon. Kevin T. Duffy) dismissing his complaint and action on the

ground that "an individual cannot sue for the deprivation of another's civil rights." (A copy of the opinion and order is appended hereto at A4.) The order below should be affirmed on the ground stated as to all defendants and, on the supplementary ground as to defendant-appellee Cravath, Swaine & Moore, that during the relevant period it was not in any way involved in proceedings in the related action upon which plaintiff bases his claim.

COUNTERSTATEMENT OF QUESTION PRESENTED

Does plaintiff have standing to sue under 42 U.S.C. § 1983 for damages he alleges resulted from an alleged violation in a federal court proceeding of another person's constitutional or statutory rights?

STATEMENT OF THE CASE

On June 2, 1971, Alice M. Calhoun filed a complaint in the District Court in the Southern District of New York against Riverside Research Institute ("Riverside") and Columbia University alleging that she had been denied a promotion by her employer, Riverside, because of her race.* The action was discontinued as to Columbia University on

* Copies of the Complaint, the Stipulation of Discontinuance and the District Court's docket in Alice M. Calhoun v. Riverside Research Institute (71 Civil 2734) are appended to the Brief for the Plaintiff-Appellant.

consent by order filed March 13, 1972. Cravath, Swaine & Moore, a defendant in this action, appeared as attorneys for Riverside until April 7, 1972, when another firm was substituted for it with Riverside's consent and the Court's approval. Cravath, Swaine & Moore did not participate in the proceedings in Alice M. Calhoun v. Riverside in any way after the substitution.*

Alice Calhoun and Riverside settled their action for \$5,900 at a conference before Judge Knapp on June 26, 1974, and a stipulation and order of discontinuance was filed July 2, 1974. As shown by the transcript of that hearing, it appears that Mrs. Calhoun was satisfied with the settlement and understood that it was final. (A portion of the transcript is included in the opinion and order appealed from and the entirety of it, including appearances, is appended as Exhibit A to the Memorandum of Law on Behalf of Defendant Skadden, Arps, Slate, Meagher & Flom, Record Document 12.)

Plaintiff herein, Alice M. Calhoun's husband, charged that all the attorneys who had occasion to appear in Alice M. Calhoun v. Riverside at any time, even during the preliminary stages of that action, "caused his wife to lose the damages that were warranted in her action", resulting in consequent injury to him. He specifically invoked 42 U.S.C.

* A conformed copy of the consent and order is appended hereto at A2. A copy of it was given to Judge Duffy while the motions to dismiss were pending at the conference on September 17, 1975.

§ 1983 and 18 U.S.C. §§ 241 and 242 as the basis for the District Court's jurisdiction. These statutes are set forth in the appendix hereto at A1.

Argument

I.

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT ON THE GROUND THAT PLAINTIFF LACKS STANDING TO SUE FOR THE ALLEGED VIOLATION OF HIS WIFE'S RIGHTS.

The statutes plaintiff invoked, 42 U.S.C. § 1983 and 18 U.S.C. §§ 241 and 242, did not confer subject matter jurisdiction over this action on the District Court.

It is settled that 18 U.S.C. §§ 241 and 242 are penal statutes which do not provide a basis for civil jurisdiction. E.g., United States ex rel. Savage v. Arnold, 403 F. Supp. 172, 173 (E.D. Pa. 1975); Brown v. Duggan, 329 F. Supp. 207, 209 (W.D. Pa. 1971).

On its face, Section 1983 of Title 42 permits claims only by persons who, under color of state action, are deprived of federally conferred rights. If anyone was deprived of a federally conferred right in Alice M. Calhoun v. Riverside, a federal action, it was Alice M. Calhoun, not plaintiff, and any such deprivation was surely not under color of any state statute, ordinance, regulation, custom or

usage.

Moreover, in part because of the "case or controversy" requirement of Article III of the U.S. Constitution, a party may not rely on a violation of the rights of another person to support a claim or a defense. McGowan v. Maryland, 366 U.S. 420, 429 (1961); Barrows v. Jackson, 346 U.S. 249, 255-57 (1953). A person such as plaintiff suing under Section 1983 may not assert a claim based upon deprivation of another's rights. Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Evain v. Conlisk, 364 F. Supp. 1188, 1190 (N.D. Ill. 1973), aff'd without opinion, 498 F.2d 1403 (7th Cir. 1973).

II.

THE RECORD IS CLEAR THAT DEFENDANT-APPELLEE CRAVATH, SWAINE & MOORE WAS NOT A PARTICIPANT IN THE PROCEEDINGS OF WHICH PLAINTIFF COMPLAINS.

Alice M. Calhoun v. Riverside was settled in June of 1974. Over two years earlier, another firm had been substituted for defendant-appellee Cravath, Swaine & Moore as Riverside's attorneys in that action. Cravath, Swaine & Moore did not participate in that proceeding in any way thereafter. It thus was not involved in the action during the settlement negotiation and did not participate in the settlement conference of which plaintiff complains. For

this additional reason, it should thus be excused from further participation in this action.

Conclusion

For the reasons stated herein, the opinion and order dismissing the complaint and action should be affirmed.

August 16, 1976

Respectfully submitted,

CRAVATH, SWAINE & MOORE,
Defendant-Appellee Pro Se,
One Chase Manhattan Plaza,
New York, N. Y. 10005

APPENDIX

18 U.S.C. § 241

Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year or both; and if death results shall be subject to imprisonment for any term of years or for life.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
APR 18 1972

-----X
ALICE M. CALHOUN,

Plaintiff, :

: CONSENT TO SUBSTITUTION
OF ATTORNEYS

-against-

RIVERSIDE RESEARCH INSTITUTE
and COLUMBIA UNIVERSITY,

Defendants. :
:-----X

: Index No. 71 Civ. 2734
: H.R.T.

IT IS HEREBY CONSENTED AND AGREED that Messrs. Meade,
Wasserman & Plowden-Wardlaw of 551 Fifth Avenue, New York, New
York 10017, be, and they hereby are, substituted in the place
and stead of Cravath, Swaine & Moore of 1 Chase Manhattan Plaza,
New York, New York 10005, as attorneys for Riverside Research
Institute in the above-entitled action.

April 7, 1972

Cravath, Swaine & Moore
Attorneys for Riverside Research
Institute

RIVERSIDE RESEARCH INSTITUTE

By *Lawrence H. O'Neil*

So Ordered April 17, 1972

H. R. Tyler, Jr.
U.S.D.J.

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

On the *10th* day of April, 1972, before me personally
came Lawrence H. O'Neill , to me known, who being by me
duly sworn did depose and say that he resides at *45 Riverside Dr*
New York, N.Y. ; that he is the President of
Riverside Research Institute, the not-for-profit corporation
described in and which executed the foregoing instrument; that
he knows the seal of said Corporation; that the seal affixed
to said instrument is such corporate seal; that it was so
affixed by order of the Board of Trustees of said Corporation;
and that he signed his name thereto by like order.

Barbara J. Casimiro

BARBARA J. CASIMIRO
NOTARY PUBLIC, STATE OF NEW YORK
Qualified on New York City,
1971, 31st Dec 30
Comm. Expires 12/31/75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ROBERT CALHOUN, JR.,

Plaintiff,

-against-

H. SPENCER KUPPERMAN, ESQ.,
et al.,

Defendants.
-----X

OPINION AND ORDER

75 Civ. 3748

11/13/75

43384

APPEARANCES

ROBERT CALHOUN, JR.,
Pro Se, Plaintiff

H. SPENCER KUPPERMAN,
Pro se, Defendant

CRAVATH, SWAIN & MOORE
Pro Se, Defendants

THACHER, PROFITT, PRIZER, CRAWLEY & WOOD
Pro Se, Defendants

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Pro Se, Defendants and for
Defendants MICHAEL H. DIAMOND, HENRY P. BAER,
J. PHILLIP ADAMS, PEGGY L. KERR

FREEMAN, MEADE, WASSERMAN & SHARFMAN
Pro Se, Defendants

FILED
U.S. DISTRICT COURT
NOV 13 9 01 AM '75
S.D. OF N.Y.

KEVIN THOMAS DUFFY, D.J.

This is an action brought under 42 U.S.C. § 1983,
18 U.S.C. §§ 241, 242, the Civil Rights Act of 1964 and

the Fourteenth Amendment. Robert Calhoun, Jr., the sole plaintiff in this action, is the husband of Alice M. Calhoun. Mrs. Calhoun had previously brought an action against Riverside Research Institute ("Riverside") and Columbia University ("Columbia") alleging discrimination based on race in the defendants' failure to promote her to the post of assistant manager of the "AMRAD Data Reduction group" at its Electronics Research Laboratories. Calhoun v. Riverside Research Institute, 71 Civ. 2734 (S.D.N.Y.). Defendants in the action before me are the attorneys and law firms who represented Mrs. Calhoun, Riverside and Columbia at various stages of that litigation.

At some point in the earlier suit, Columbia was discontinued as a defendant. The claim against Riverside resulted in a "disputed settlement agreement" of \$5,000 to cover Mrs. Calhoun's out of pocket litigation expenses. Attorneys' fees were not included in this figure since counsel for Mrs. Calhoun had undertaken the case on a pro bono basis.

The "disputed settlement" was successfully challenged by Mrs. Calhoun at a hearing before Judge Knapp. The Judge expressed a willingness to act as a catalyst to bring the parties together on a new agreement:

MRS. CALHOUN: Your Honor Mr. Calhoun is criticizing me for negotiating a settlement --

THE COURT: Mr. Calhoun is not attacking anybody. Mr. Calhoun is expressing his wishes. My point is, Mr. Calhoun, we are all here, we are all present, and why don't we try to settle it right now?

MR. CALHOUN: Right.

THE COURT: So let us not worry about who did what in the past.

Following a discussion off the record, a settlement figure of \$5,900 was agreed upon. The agreement was placed on the record:

THE COURT: I take it you represent that this settlement takes into account any claims you have against Riverside Research Institute?

MRS. CALHOUN: Yes, I am under the impression that once you have settled, there is no recourse.

THE COURT: You represent to me that you have no claims of any sort against Riverside Research or anybody there?

MRS. CALHOUN: Yes.

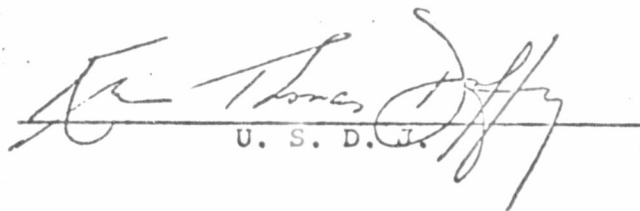
THE COURT: That is not taken care of by this settlement?

MRS. CALHOUN: I do.

Mr. Calhoun now alleges that the defendants conspired in the earlier litigation to do harm to him and his wife by causing "his wife to lose the damages that were warranted in her action." It is the general rule that an individual cannot sue for the deprivation of another's civil rights. McCowan v. Maryland, 366 U.S. 420, 429 (1961); Evain v. Conlisk, 364 F.Supp. 1188 (N.D.Ill.), aff'd, 498 F.2d 1403 (7th Cir. 1974). Only Mrs. Calhoun is in a position to raise any wrongs done to her. The statement that Mr. Calhoun was in turn harmed does not cure this defect.

Since plaintiff lacks standing, the complaint fails to state a claim upon which relief can be granted. The action, therefore, must be dismissed as to all defendants. Plaintiff's motions for summary judgment and other relief are thus mooted.

SO ORDERED.


U. S. D. J.

Dated: New York, New York
November // , 1975.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT CALHOUN, JR.,

Plaintiff-Appellant,

-against-

H. SPENCER KUPPERMAN, ESQ., et al.,

Defendants-Respondents.

Docket No. 75-7682

AFFIDAVIT OF
SERVICE BY MAIL

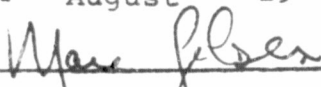
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

The undersigned, being duly sworn, deposes and says:
Deponent is over the age of 18 years, is not a party to this action
and resides at 710 Rhinelander Ave., Bronx, N.Y. 10462

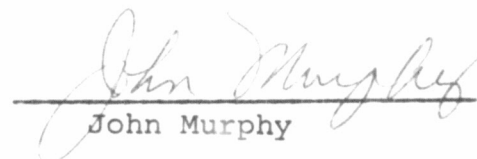
On the 16th day of August 19 76 deponent served the
annexed BRIEF FOR DEFENDANT-APPELLEE CRAVATH, SWAINE & MOORE TWO
upon ~~each of~~ the below listed attorney(s) by depositing ~~a true copy~~ ^{xxx}
(copies) of the same securely enclosed in a postpaid, properly
addressed wrapper in an official depository under the exclusive care
and custody of the United States Postal Service within the State of
New York.

THACHER, PROFFITT & WOOD
Defendant Pro Se
40 Wall Street
New York, N.Y. 10005

Sworn to before me this 16th
day of August 19 76)



MARC GOLDEN
Notary Public, State of New York
No. 31-4615406
Qualified in New York County
Commission Expires March 30, 1977


John Murphy

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT CALHOUN, JR.,

Plaintiff-Appellant,

-against-

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upon ~~(each of)~~ the below listed attorney(s) by depositing ^{two} ~~a~~ true copy
(copies) of the same securely enclosed in a postpaid, properly
addressed wrapper in an official depository under the exclusive care
and custody of the United States Postal Service within the State of
New York.

Robert Calhoun, Jr., Pro Se
Plaintiff
111-11 132nd Street
Jamaica, N.Y. 11420

Freeman, Meade, Wasserman, Sharfman & Schneider
Defendant Pro Se
551 Fifth Avenue
New York, N.Y. 10017

Skadden, Arps Slate, Meagher & Flom
Defendant Pro Se
919 Third Avenue
New York, N.Y. 10022
Sworn to before me this 16th
day of August 19 76)

Ralph M. Dionne

RALPH M. DIONNE
Notary Public, State of New York
No. 41-60 2070
Qualified in Queens County
Cert. Filed in New York County
Commission Expires March 30, 1978

John Murphy
John Murphy

